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LAW AND RELIGION.*

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The subject of this lecture is not only a topic of historical and theoretical interest, but also one of some practical importance at the present day. Many a well-meaning reformer in this country attempts to seek the aid of the legislature to quicken the pace of reform. Such attempts are sometimes opposed as endangering religion. A dispassionate study of the relation between law and religion is thus of more than academic interest. It is however necessary to recognise, at the outset, that the matter is one on which there is likely to be honest difference of opinion.

The word "religion" has been used and understood in different senses, and in the present discussion, I refer to religion in the sense of a faith in an unseen Power which controls the destinies of mankind, and whose existence, powers and commands are unknowable except through some kind of revelation. The inter-relation between law and religion has arisen or has persisted in many ways and from many causes. The belief of any community as to the origin of law, the theories prevalent in the community as to the origin and functions of the State, the ideas accepted by that community as to the meaning and purpose of life, the sanctions by which social duties were or had to be enforced in the community, the classes or authorities

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who were the repositaries of legal knowledge and were responsible for the development of law and the tribunals by which justice was administered,—these are the principal factors to be considered in this connection. Religion not merely consists of a bundle of creeds and dogmas but inculcates a particular way of life arising out of and consistent with its philosophy as to the meaning of life. In so far as that way of life involves theories as to man's duties to himself and to his fellowmen, these theories must profoundly influence the concepts underlying the system of law by which its followers govern themselves. A vague religiosity or a mere sentiment of religion without a definite philosophy of life is hardly likely to have much influence on man's social behaviour.

The conception of law has undergone change from stage to stage of human history. We have been so used to the Austinian conception that we are apt to forget its limitations and historical contradictions. A study of the works of the historical and comparative schools of jurisprudence will be a useful corrective to this tendency. Vicissitudes of political history in different parts of the world brought in their trail radical changes in some places in the connection between law and religion. In the West, the separation between law, religion and morals, between the Church and the State, between legal tribunals and ecclesiastical tribunals proceeded apace. The history of the East was different. There can be little doubt as to the necessity and advantage of a certain degree of separation between religion and law. The growing secularisation of life, the necessity for administering and enforcing the law through temporal tribunals with the aid of temporal sanctions and the inevitability in modern conditions of legislation by temporal authority emphasise the need for such separation. This, however, is different from postulating the divorce of law from religion. The author of the Sukra Niti observed that a minister should recommend to the King the enactment of laws calculated to secure happiness both here and hereafter. With this might be compared the statement of a recent western writer that a scientific statesman who would attempt to prescribe codes for human conduct without regard to the religious nature of man was as likely to fail as the religious reformer who prescribed codes without regard to human nature.

INTER-RELATION OF LAW AND RELIGION.

The intimate connection between religion and law, was a characteristic of the early stages of many systems of law. Among the Hebrews the connection between the two will be evident from the Pentateuch. Even in the case of systems like the Roman and the English, which in their advanced stages have been held up as models for the world, the inter-relation between law and religion in the earlier stage has been recognised, and traces of the influence of religion on law are still to be found in some branches of the English law, especially those relating to marriage and descent of property, wills, etc. Among the Mahomedans, the *Quoran* and the sayings of the Prophet are regarded as authoritative sources of law. Among the Hindus, the *Vedas* and *Smritis* form living sources of law and the connection between religion and law had continued so long as to form almost a ground for condemnation of the Hindu Law according to one school of thought.

It will be scarcely possible to deal with the historical aspects of the subject within the limits of this lecture. Some aspects have been dealt with by Sir Henry Maine in several of his lectures. One lecture re-printed in "Early Law and Custom" bears the very title of to-day's lecture. Interesting and historical information will also be found in Pollock and Maitland's History of the English Law. The development of Mahomedan Jurisprudence has been described by Sir Abdur Rahim in his Tagore Law Lectures. There are many who think that some of Maine's theories cannot be accepted as universally true and that others require to be qualified. Some of Maine's observations about the Hindu Law it would be impossible to accept as fair or correct. He seemed to regard the Hindu Law as full of "monstrous iniquities" and as having been "perverted in different directions by the priestly class". Such observations I venture to think can be the result only of imperfect acquaintance with Hindu Law books as only very few were available to Maine in those days. It was further not easy for a European critic to view these books with a sympathetic imagination. Maine also seems to me now and then to have yielded to a temptation to enunciate neat antithetical propositions by way of contrasting the Hindu Law with the Roman Law of which he was a great admirer. For this reason and also on the ground

that the history of the Hindu Law, its present condition and the lines of its future development are of more direct interest to us here, I propose to devote the rest of this lecture to the relation of Law and Religion in that system.

It is common knowledge that the *Vedas* and the *Smritis* are held to be the inspired sources of Hindu Law. Though these are regarded as embodying the portion ordinarily referred to as *Vyavahara*, it will be scarcely right to think that Hindu scholars treat every statement in the *Vedas* or the *Smritis* as standing on the same footing as every other statement. It is the misconception on this point that has led to erroneous ideas about the unalterability even of the *Vyavahara* portion of Hindu Law. The Mimamsa School has made an attempt to analyse the various portions of the *Vedas* under different categories, such as statements embodying *Vidhi* and *Nisheda* and statements in the nature of *Arthavada* and *Anuvada*. It is only portions classified as *Vidhi* or *Nisheda* which are unquestionable and unalterable. In regard to the others, even the orthodox school recognises that they are not equally authoritative as *Vidhi* and *Nisheda* portions. Sankara found no difficulty in putting aside not merely *Purvakandas*, but even considerable portions of the *Upanishads* as being only in the nature of *Arthavada*. The author of the *Smriti Chandrika* has stated in one place that all directions contained in the *Smritis* with reference to *Vyavahara* are in the nature of *Anuvada*. (Ch. I, Pl. 27.)

Numerous passages are to be found in the Sanskrit authorities suggesting some kind of 'compact' (if not contract) in relation to political society; but in the main the Hindu theory of the state was monarchical. The king was the gift and the representative of God: but the Hindu conception of the divine origin of kings was very different from the theory of the Divine right of kings prevalent in Western countries. The Hindu concept never placed the king above the law in the sense in which the Divine Right theory did. It was never the Hindu theory that the king could change the law as he pleased. He was merely expected to enforce law. That accounted for the great difficulty that later Hindu lawyers felt in changing Hindu Law even where they felt re-adjustments necessary to meet changing conditions.

In the theocratic State the king was responsible for the due observance by his subjects not only of the precepts of law but also of the precepts of religion. This accounted for and helped the intermingling of civil and religious duties and temporal and religious sanctions.

In regard to the scope and purpose of law there is a difference between present-day concepts and earlier ones. Separation of law, religion and morals is much more characteristic of modern thought than it was of ancient thought and life. There is no word in the Sanskrit language which has the same connotation as the word 'Law'. The Hindu conception of *Dharma* represented obligations and duties prescribed by the *shastras* for man's conduct in life as much towards God as towards his parents, wife and children, brothers and sisters, king and fellow-men. In the earlier *smritis*, these obligations were discussed together and it was only the later *smriti-kartas* that made the differentiation between *Achara, Vyavahara* and *Prayaschitta.*

Comparatively scanty information is available as to the kind of judicial system that was in vogue in ancient India. There are no doubt elaborate descriptions in Manu and Kautilya about courts of law, but except some kind of arrest and suretyship for the performance of the decrees of court, there is very little information as to the way in which decisions of courts, for instance, were enforced in those days. As regards procedure, they seemed to have to some extent employed the system of examining witnesses. Whether there was appreciation of evidence in the modern sense, or whether evidence was weighed by the number of witnesses on either side, or whether a tribunal depended on its own knowledge of the details of a case, it is not easy to determine. But one thing is certain; judges, parties and witnesses all were in fear of lying and they proceeded on the footing that the oath had some value. Hindu theory always associated a *drishta-phala* and an *adrishta-phala* with every act of man; hence the recognition of religious sanctions even for civil duties. That at one stage religious sanctions must have been found on the whole effective even in enforcing civil duties can scarcely admit of much doubt. I am free to own that I entertain grave apprehensions as to the efficacy of temporal sanctions in these days; for temporal sanç-

tions so fai known to man seem to be losing their force. Imprisonment for debt has practically been abolished. The facilities afforded by the Insolvency Laws are freely availed of by debtors to benefit themselves at the expense of their creditors. The oath or affirmation administered to witnesses by our courts does not seem to ensure truthfulness. Even imprisonment for crime has no value as a deterrent. Modern criminology has indeed little place for *sanctions*; it only seeks to correct or reform the criminal.

As regards the tribunals that administered law in ancient days, we find that panchayats existed from ancient days. I cannot say much as to its being of Dravidian or other origin, but there was certainly the analogue of the panchayat in the *Dharma Shastras*. Whatever a man did was assumed to be done —that was clear from the Hindu's *sankalpa* before beginning any act—in the presence of a *parishad* with a personality distinct from that of the individuals composing it. The *parishad* was assumed to be one of learned, at any rate honest, men and whether it was concerned with a civil dispute or a *prayaschitta* or other ceremony the influence of a *parishad* was there and was felt. The idea of a judge distinct from the jury does not appear to have emerged very clearly in the ancient Hindu legal system. In some books there were references to appeals to and administration of justice by the King. But one could not gather that all this was of such a nature as to promote a system of law as such. It was not until there came into existence some kind of centralised empire and centralised administration of justice that there could be anything like the development of a scientific system of law in the modern sense.

How changes were effected.

As I have already stated, law according to the Hindu conception was not considered as something which a king or other temporal authority could alter. It was only on the lines suggested, *viz.*, of classification into *Vidhi* and *Nisheda* or *Arthavada* and *Anuvada* that they could at all bring it within the power of commentators to make changes by either attempting a reconciliation of different texts or laying emphasis on one or the other of the texts, or by emphasising the theory of *Anuvada* so as to say that even what was stated in the

sacred books might be changed, or by insisting that law was after all worldly and should, therefore, every now and then be brought into conformity with practices and conditions prevailing in the country. In the *Mitakshara* for instance there is a definite statement to the effect that, notwithstanding the *Vedas* authorising or insisting upon a particular act, nothing abhorrent to the ideas of the world should be done. (*See* Ch. I, S. 3, Pl. 4.) It was by such processes of interpretation that changes of law had to be attempted.

The Nibandha works come into more modern history. The attempt to find out what exactly was the state of society in the days of Manu must, largely be speculative. But the view of many European writers that the state of society described by Manu must be something in the nature of an ideal society was a mistaken one. No fair-minded reader could say that the twelve classes of sons or the eight kinds of marriages, the numerous kinds of inter-marriage, the classification of descendants of such marriages or similar other provisions of the Code could be deemed to represent an imaginary state of affairs. A close study would show that what was stated therein was a set of facts that prevailed at the time, though the preferences indicated showed really what the *smritikarta*, would suggest as the better course. The most important point to remember in following the changes in law was that far from religion or religious ideas having ever put back legal ideas, it was under colour of religion that the best advance was made so far as Hindu Law was concerned. The way in which the law-givers of those days brought about a change from the unapproved forms of marriage to approved forms of marriage was by insisting that wives taken in the unapproved forms of marriage were unfit to participate in religious ceremonies. Many other reforms in law were effected by appealing to religious considerations. For instance, the way in which polygamy was discouraged by the *smritis* was by a refusal to accord a status for purposes of religious ceremonials to any wife, other than the first. Much the same process was adopted to supersede the subsidiary sons, except the Dattaka. Religion was thus the one sanction and an effective sanction that law employed in its own amelioration. In view of all this, the criticism that

"In the East, the religious oligarchy, with a view to increasing and consolidating its own influence presented to the world a code, not so much of

rules actually observed as of rules which the priestly order considered to be proper to be observed",

betrays utter ignorance of the history of the *Dharma Shastras*. In the very beginning of the *Sutras of Apastamba*, there is a reference to *Samayacharika*, rules derived from the practice of the world and of the community. This showed the factor that largely influenced the contents of the *Sutras*.

As to the familiar diatribe against the priestly order, I am compelled to say that it rests on an imperfect knowledge of the standard of life that the *Dharma Sastras* insisted on for the members of that order. If that standard has not always been lived up to, it is not the fault of the *Dharma Sastras* or of the founders of the system contemplated by them. I cannot do better than invite a comparison between the conception of that order as developed in the *Smritis* and Plato's concept of the philosopher-statesman. The idea underlying both conceptions is that there should be a class of citizens:

"Who shall have no wealth, want no wealth, take no interest in wealth, but live entirely for other things; their physical needs shall be supplied by a lower class of functionaries who shall go on desiring wealth and working for rewards of wealth". (E.J. Urwick, The Social Good.)

(*To be continued*)